

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act of 1996	)	
	)	
Deployment of Wireline Services Offering	)	CC docket No. 98-147
Advanced Telecommunications Capability	)	
_____	)	

**COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),<sup>1</sup> through the undersigned and pursuant to Federal Communications Commission (FCC / Commission) Rules 1.415 and 1.419,<sup>2</sup> hereby provide its comments to the FCC's Further Notice of Proposed Rulemaking (FNPRM) in the above docketed proceeding. Pursuant to section 1.2 of the FCC's rules,<sup>3</sup> USTA now submits comments to the FNPRM.

**BACKGROUND**

On August 21, 2003, the FCC released the *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98;

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<sup>1</sup> USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

<sup>2</sup> 47 C.F.R. §§ 1.415 and 1.419.

<sup>3</sup> 47 C.F.R. § 1.2.

*Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (Triennial Order).<sup>4</sup> Included in the FCC's Triennial Order was a FNPRM. In the FNPRM, the Commission proposes to modify section 252(i), the pick-and-choose rule.<sup>5</sup> The pick-and-choose rule allows requesting carriers to opt into individual portions of interconnection agreements without accepting all terms and conditions of such agreements. The Commission tentatively concludes that a modified approach to the pick-and-choose rules would better serve the goals of section 252(i) and sections 251 and 252 in general.<sup>6</sup> The Commission also proposes that: "[I]f incumbent LECs do not file and obtain state approval for a SGAT (statement of generally available terms and conditions), the current pick-and-choose rule would continue to apply to all approved interconnection agreements between the incumbent LEC and other carriers."<sup>7</sup> However, if an incumbent LEC files and receives state approval for a SGAT, "the current pick and choose rule would apply solely to the SGAT, and all other approved

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<sup>4</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. August 21, 2003)(Triennial Order).

<sup>5</sup> See 47 U.S.C. § 252(i). Section 252(i) of the Communications Act of 1934, as amended, states:

(i) Availability to Other Telecommunications Carriers.—

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

<sup>6</sup> *Id.* at ¶ 713.

<sup>7</sup> *Id.* at ¶ 725.

interconnection agreements would be subject to an ‘all-or-nothing’ rule requiring carriers to adopt the interconnection agreement in its entirety.”<sup>8</sup>

## **DISCUSSION**

USTA supports voluntary, privately negotiated, agreements between parties. The Commission’s tentative conclusion does not eliminate the pick-and-choose rule, nor does it go far enough to support voluntarily negotiated agreements between the parties for “any interconnection, service, or network element.” Thus, USTA disagrees with the FCC’s “all or nothing” tentative conclusion.

### **The FCC Has The Authority To Eliminate The Pick-and-Choose Rule**

The Commission seeks comment as to whether it has the authority to “eliminate the pick-and-choose rule and substitute an alternative interpretation of section 252(i).”<sup>9</sup> USTA contends that the FCC has the authority to eliminate the pick-and-choose rule. USTA agrees with certain incumbent local exchange carriers (ILECs) that the pick-and-choose rule allows a competitive local exchange carrier (CLEC) “to cherry-pick individual provisions of any approved interconnection agreement previously negotiated under § 252 between an [ILEC] and another CLEC, without any obligation to accept the remaining provisions of the agreement.”<sup>10</sup> We agree that the elimination of the pick-and-choose rule “would encourage mutually beneficial business relationships between ILECs and CLECs as opposed to the adversarial, regulation-based relationships that are more typical today.”<sup>11</sup>

Further, USTA supports the FCC’s tentative conclusion that it may adopt a different rule pursuant to section 252(i). The Supreme Court has stated in *AT&T Corp. v. Iowa Utilities Board*

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at ¶ 720.

<sup>10</sup> *See Id.* at ¶ 719 (citing Verizon, BellSouth, SBC and Qwest ex parte letter, January 17, 2003).

that this “is a matter eminently within the expertise of the Commission” as to whether the pick-and-choose rule “will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions).”<sup>12</sup> Thus, USTA contends that the pick-and-choose rule impedes negotiations between CLECs and ILECs and should be eliminated, and that the FCC has the authority to adopt a different rule pursuant to section 252(i) that would support voluntary, privately negotiated, agreements between parties.

### **The FCC’s “All Or Nothing” Tentative Conclusion**

The FCC has tentatively concluded “that limiting carriers’ opt-in rights to entire agreements (subject to satisfaction of the SGAT condition) would be consistent with the text of section 252(i), which requires only that an incumbent LEC “make available any interconnection, service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions* as those provided in the agreement.”<sup>13</sup> USTA disagrees with the Commission’s “all or nothing” tentative conclusion because it continues to impede the ability of parties to negotiate voluntary agreements that are in the best interests of CLECs and ILECs. The give and take inherent in the bargaining process between carriers would continue to be adversely impacted by government regulations that stifle negotiated business agreements. Moreover, the FCC’s “all or nothing” tentative conclusion does not allow for the flexibility of forbearance under section 252(i). Regulatory forbearance would provide carriers the ability to enter into privately

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<sup>11</sup> *Id.*

<sup>12</sup> *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999).

<sup>13</sup> Triennial Order at ¶ 728.

negotiated agreements and would allow residential and business consumers to benefit from increased competition as envisioned by Mpower in its Flex contract proposal.<sup>14</sup>

The FCC's "all or nothing" tentative conclusion continues to retain the pick-and-choose rule when an ILEC does not file and obtain state approval for a SGAT. As explained above, USTA seeks nothing less than the complete elimination of the pick-and-choose rule. In sum, the FCC's "all or nothing" tentative conclusion would allow CLECs to continue benefiting from contractual arrangements that they are not privy to, by opting into "all or nothing" contracts based on state approval of a SGAT or pick-and-choose contractual terms from prior ILEC/CLEC agreements that meet with their approval, without the benefit of direct negotiations with ILECs.

### **CONCLUSION**

USTA believes that by doing away with the pick-and-choose rule and providing the ability for ILECs and CLECs to privately negotiate voluntary agreements under section 252(i) will allow for negotiations that will be in the best interest of all parties. By doing so, greater incentives will ensue for CLECs and ILECs to invest in deploying advanced telecommunications services and foster a competitive marketplace in regards to price, quality of service and availability of services, which ultimately benefits the consumer. This cannot be accomplished by the FCC's "all or nothing" tentative conclusion or through the retention of the pick-and-choose rule. Consequently, the FCC must eliminate the pick-and-choose rule and interpret section


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<sup>14</sup> See Reply Comments of the United States Telecom Association (USTA), CC Docket No. 01-117, (July 18, 2001).

252(i) to allow for voluntary, privately negotiated, agreements between the parties.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

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